STATE OF MICHIGAN

IN THE

SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Doctoroff, P.J. and Holbrook, Jr. and Hoeskstra, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court
No. 120185

-vs-

WILLIAM C. McGEE,

Defendant-Appellee.

Court of Appeals No. 215576
Oakland County CC No. 98-159206 FH
98-159207 FH, 98-159213 FH, and
98-159214 FH

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court entered an Order (47a) on December 10, 2002, granting Plaintiff-Appellant's application for leave to appeal and also granting Defendant-Appellant's application for leave to appeal from a published opinion of August 31, 2001, of the Court of Appeals. (Doctoroff, P.J., Holbrook, Jr. and Hoekstra, JJ.). (33a). 247 Mich App 345 (2001). This Court on January 10, 2002, ordered the matter held in abeyance pending a decision in the case of *People v Lett.* (45a) The Court of Appeals reversed the trial court that had accepted the jury's verdict, after sua sponte declaring a mistrial. This Court, in its order granting leave to appeal, directed the parties to brief the issues of (1) whether the trial court's decision was based on manifest necessity; (2) whether the alleged error of repolling the jury and reinstating the guilty verdict is subject to harmless error analysis and, if so, whether the alleged error was harmless; and (3) whether the constitutional protection against double jeopardy is implicated in this case and, if so, whether a harmless error analysis is applicable. (47a).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S DECISION TO DISMISS THE JURY AFTER THE FOREPERSON HAD ANNOUNCED THE VERDICT, BUT BEFORE THE WHOLE PANEL WAS INDIVIDUALLY POLLED, WAS CONSENTED TO BY THE DEFENSE?

The trial court answered this question "Yes."

The Court of Appeals answered this question "No."

Plaintiff-Appellant answers this question "Yes."

Defendant-Appellee will answer this question "No."

II. WHETHER THE TRIAL COURT'S DECISION TO RECALL THE JURY AND REINSTATE THE JURY'S VERDICT IF ERROR, WAS HARMLESS WHERE THE INITIAL DECISION OF THE TRIAL COURT WAS NOT A MISTRIAL BUT A GRANT OF A NEW TRIAL?

The trial court did not answer this question.

The Court of Appeals answered this question "No."

Plaintiff-Appellant answers this question "Yes."

Defendant-Appellee will answer this question "No."

III. WHETHER THE CONSTITUTIONAL PROTECTION AGAINST BEING TWICE PLACED IN JEOPARDY IS NOT IMPLICATED IN THIS MATTER WHERE DEFENDANT CONSENTED TO THE ACTIONS OF THE TRIAL COURT, AND/OR THE TRIAL COURT DETERMINED THAT THERE WAS MANIFEST NECESSITY FOR ITS ACTIONS?

The trial court answered this question "No."

The Court of Appeals answered this question "No."

Plaintiff-Appellant answers this question "No."

Defendant-Appellee will answer this question "Yes."

STATEMENT OF FACTS

Defendant, William McGee, was charged with two counts of delivery of less than 50 grams of cocaine contrary to MCL 333.7401(2)(A)(4), delivery of an imitation controlled substance contrary to MCL 333.7341(3), and delivery of 50-224 grams of cocaine contrary to MCL 333.7401(2)(A)(3). Following a jury trial[1] before the Honorable Jessica Cooper (then an Oakland County circuit judge), defendant was convicted of the above charges. He was sentenced as a second habitual offender (MCL 769.10) to sentences of 1-30 years on the delivery of less than 50 grams of cocaine, 1-3 years on the delivery of an imitation controlled substance, and 10-20 years on the delivery of 50-224 grams of cocaine. The sentences were to be served consecutively.

After the parties made their opening statements, a short bench conference was held and then the jury was excused. Trial counsel indicated that the only defense that he could offer was that defendant committed these crimes out of desperation. The reason for the trial was that defendant insisted on taking the matter to trial, and putting the People to meeting their burden of proving their case beyond a reasonable doubt. (112-116a). The jury was returned to the courtroom, and Officer Matthew Krupa from the Pontiac Police Department was called to testify. Krupa, at the time of trial, was assigned to the DEA task force out of Detroit, but in February and March of 1998; he was working for the Narcotics Enforcement Team of Oakland County (NET). In early 1998, Krupa[2] was introduced to defendant, who allegedly was a crack dealer from the

[1] Prior to trial, Judge Cooper conducted an entrapment hearing at the defendant's request. A week later in mid trial, the court held a *Walker* hearing, at the defense request. *People v Walker*, 374 Mich 331 (1965).

[2] Officer Krupa was introduced to defendant as "Matt." (144a).

City of Pontiac. Defendant provided Krupa with a pager number where he could be reached. (118a).

On February 17, 1998 Krupa paged defendant but did not receive a response. Krupa then drove over to a house at 168 Baldwin, in Pontiac, where he knew that defendant was staying. When defendant came to the door, he asked Krupa if he had paged. Krupa explained that he had placed his phone number and the numerals 1-0-0 after the phone number to indicate the dollar amount of cocaine that he wanted to order. Outside, on the porch, Krupa told defendant that he needed a hundred dollars of cocaine. Defendant indicated that he would go inside and cut it up. After a few minutes, defendant returned and had four prewrapped rocks of crack cocaine in his hand, along with two loose rocks of cocaine. Defendant indicated that he had given a little extra, and that if Krupa wanted to purchase more, to page him. Defendant indicated the more that Krupa purchased, the better the deal he would receive; in other words, Krupa would get more cocaine for his dollar with larger purchases. Defendant also told Krupa that he had been selling cocaine for a long time, since he was 14 years old, and he was a good seller and had not been caught because he was smart. (121a). The drugs were field tested with a positive result for cocaine. The drugs were then packaged, labeled and sent to the State Police Crime Lab for analysis. (121a).

Krupa paged defendant on February 25, 1998. This time, defendant called the Officer back from an address at 364 West Huron, in Pontiac. A second purchase was arranged in a parking lot of a party store in Pontiac. The amount was $100 worth of drugs. Defendant entered Krupa's car and handed him a "wrapped baggie of suspected cocaine," telling the officer that it was a hundred dollars worth of cocaine. After defendant was paid, he told Krupa that he was working on a transaction for marijuana and powder cocaine, and to page him (defendant) when

Krupa needed more product. (123a). A field test of the suspected cocaine was negative for the presence of cocaine. The next day, Krupa called defendant and complained that the drugs were not real. Defendant assured him that he did not know, and that he had complaints from other customers. Defendant also indicated that he would make it up.

A third transaction was discussed for powder cocaine. Defendant offered to sell an ounce of powder for $800 to $850. Defendant indicated that he wanted Krupa to come over to his mother's house at 364 Huron, in Pontiac, for this transaction. Krupa indicated that he did not want to go into a house for safety reasons. Defendant assured him that because it was his mother's house, nothing would happen. At that address, an unknown black male was standing in the doorway. He let Krupa into the house and closed the door. Defendant was standing in the stairwell and motioned Krupa up the stairs. Defendant pulled out a bag of cocaine and told Krupa that he had ordered an extra three grams for himself. After removing that cocaine, Defendant handed the bag to Krupa in exchange for $850. Defendant indicated that he was going to "rock up" (make crack cocaine) the remaining cocaine and then sell it. (127a). After the transaction was complete, defendant again indicated that the more money that Krupa spent, the better deals that he would receive. He also indicated that Krupa should page him when he was ready for more. (128a). Krupa indicated that he received 6-8 phone calls from the defendant that were not in response to his pages, but were initiated by the defendant.

On March 30, 1998 contact was again made with defendant. After discussing another purchase, a price of $850 was set for the purchase of two ounces of cocaine. Defendant set the price and the meeting place. Defendant wanted the Officer to go to his mother's house, but Krupa's supervisor did not want him to go into a house with so much money. The meeting was then set for the party store where the second deal took place. (132a). Defendant was sitting on

the porch at 364 Huron with another person when Krupa drove by on his way to the party store. Defendant walked over to the store, entered the passenger side of Krupa's vehicle, and pulled out a large amount of cocaine from his front pocket. (131a). Krupa handed defendant $1000, while the arrest crew moved into place and effected the arrest. A field test of the package was positive for the presence of cocaine. The package was also sent to the State Police Crime Lab for additional testing.

At the crime lab, Susan Isley, a forensic scientist with the Michigan State Police, analyzed the substances received at the crime lab from the Oakland County Narcotic Enforcement Team. She compiled four reports indicating that three of the substances contained cocaine and the fourth did not contain cocaine. (154a). One of the cocaine packages weighed 54.92 grams and the rest were less than 50 grams. (156a).

Deputy Brent Miles was working with NET at the time of these crimes in 1998. After the arrest of defendant, he spoke with him in the Detective Bureau of the Oakland County Jail. Miles informed defendant of his *Miranda*[3] rights. Defendant waived these rights and agreed to talk with the Deputy. (170a). Defendant indicated that he sold cocaine on three separate occasions to Officer Krupa. The first time was a hundred dollars worth of crack cocaine. The second time he sold an ounce of cocaine to Officer Krupa and the third time he sold two ounces of cocaine to the undercover officer, before he was arrested. (170-171a). Defendant did not mention selling the imitation controlled substance to the Officer. After listening to Defendant's statement, Miles had defendant write out his statement.

> Matt called me one time and wanted an ounce. I called my friend and got one for 850. Matt gave me $50 for getting it for him. Now this time Matt wanted three ounces. My friend said no, only two

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

> because I think he's a cop and I don't want him to see my face. So Matt wanted to meet me at the store. My friend gave me two ounces and I delivered it to the store to Matt. The police jumped out as soon as I walked up and got into Matt's car. (177a).

At the conclusion of Miles' testimony, the People rested. Defense counsel requested that the matter be continued, so that the defendant's testimony would not be given piecemeal. Prior to defendant's testimony, trial counsel made a record that defendant was testifying against his advice. Defendant indicated that he wanted the jury to hear his side of the story. (183a). Defendant testified that he met Officer Krupa in January of 1998 through a third party, who introduced Krupa as Matt from New York. (187a). Defendant recounted the first sale of $100 worth of crack cocaine and the second purchase at the party store. The third purchase was for an ounce of cocaine. Defendant claimed that he suspected that he was dealing with a police officer, and claimed that Krupa offered $50 extra for the ounce of cocaine. Defendant asserted that Krupa wanted three ounces, but that he (defendant) could only get two ounces. (191a). On cross-examination, defendant admitted that he delivered cocaine three times to the officer and one time he delivered "fake cocaine" to the officer. Each of these transactions were for cash. (193a). In rebuttal, Officer Krupa denied that there was ever any extra money given to defendant for the drugs. Krupa maintained that defendant set the price for the drugs and that defendant offered discounts for greater volume purchases. Krupa also noted that during the third transaction defendant took a cut of cocaine before giving the drugs to Krupa. (196a).

Following closing arguments, Judge Cooper instructed the jury without objection. Juror number six was excused as the alternate juror, and the jury was excused to deliberate at 11:39 a.m. (211a). At 11:59 a.m., the jury returned to the courtroom with a verdict. The foreperson announced that the verdict on count I was guilty, the verdict on count II was guilty, the verdict

on count III was guilty, and the verdict on count IV was guilty. (212a). Trial counsel indicated that he wanted the jury polled. The following transpired:

THE COURT: Thank you. In finding the defendant guilty on all four counts, juror number two, was that and is that your verdict?

JUROR NUMBER TWO: Yes.

THE COURT: Juror number three, was that and is that your—why is there another juror here?

JUROR NUMBER SIX: I'm the alternate.

THE COURT: Did you go into the jury room?

JUROR NUMBER SIX: Yes.

THE COURT: Why did you go into the jury room?

JUROR NUMBER SIX: I was not instructed to do anything different.

THE COURT: Did you hear me dismiss you from the jury?

JUROR NUMBER SIX: I did.

THE COURT: You did.

(Conference at Bench held off the record)

THE COURT: Thank you, members of the jury. I appreciate your time and consideration and we will officially release you from jury service. Thank you.

(Jury leaves courtroom about 12:02 p.m.)

THE COURT: I just knew this wasn't going to be a good day. We have a mistrial. Mr. McGee, there were thirteen jurors who voted for your guilt, as opposed to twelve, and that is why we have a mistrial, because someone couldn't count when they were sending the jury into the jury room. But that's okay. We'll try this again,

starting tomorrow. Unless Mr. McGee can understand that when he gets on the stand and confesses to this crime that he's not going to get a not guilty verdict. Perhaps you might wish to speak with him in the interim. (213-241a).

The next morning when court reconvened, Judge Cooper indicated that she had done some research and now believed that the matter did not have to be retried. Instead, she intended to recall the jurors and poll them and reinstate the verdict. (216a). Returning to the bench, Judge Cooper inquired if the attorney's could recall the conversation that took place at the bench. The assistant prosecutor indicated that the court stated that the 13 jurors would result in a mistrial, she also indicated that she was shocked and was not sure of the law, so she trusted the court's ruling. She did not object nor did she affirm the decision. (217a). Trial counsel indicated that was his recollection stating; "I know I didn't affirm—respond affirmatively. When the Court said we have a mistrial, I think I did this, a slight nod, acquiescing in the Court's statement." Judge Cooper made sure that there was a nod, that there was no protest, and trial counsel indicated that he did not protest. (218a). Judge Cooper ruled:

> Well, then we don't have a problem then. Then we either have a mistrial or I reinstate the verdict. I've done research, and the fact that we have an extra juror will go—is not a mistrial. If you had eleven jurors, we would have a problem. If we have thirteen jurors it's not a problem and in point of fact, there are many states in the union who allow the alternate in there in deliberations. We do not, but many other states do. The problem would be if there were eleven jurors. It is not a problem if there were thirteen.
>
> Now, the other difficulty is that the poll was not completed. If you wish, we can now compile the addresses and phone numbers of the jurors and we can bring them back in and make a record and I can reinstate the verdict. Or we can go forward with a second trial, because there was not a protest, there was a silent acquiescence with a nod to the mistrial. (218-219a).

Judge Cooper also noted that the jury had stated that the verdict was guilty, prior to her declaration of the mistrial. This event distinguished the cases where a mistrial was declared prior to the verdict. "There's a verdict that was rendered here." In response to the defense argument that the verdict was not complete until the jury is polled, Judge Cooper stated that " the verdict was rendered when (a) we have a marked verdict sheet and (b) when the juror—the foreman indicates that that is the verdict of the jury. The polling is simply a verification." (220a). Trial counsel pressed for dismissal, but Judge Cooper responded that trial counsel had nodded during the discussion at the bench, and that was acquiescence of the defendant. Trial counsel indicated that there was not a record made of what occurred at the bench, and that this was a distinction that mattered. (222a). Judge Cooper asserted that once the verdict was rendered, it was a valid verdict, and the polling was for the record. "The prejudice to the defendant is not there and I will reinstate the case. We simply jumped the gun. And as far as the polling is concerned, we will bring the jurors back so that we can be satisfied with the polling."(227a).

On October 9, 1998 the jurors were recalled to complete the polling. Judge Cooper indicated that the verdict form signed by the foreman was in the court file. Judge Cooper then inquired of the foreman whether he had given the verdict, and if he had been previously polled. After receiving an affirmative response, she then polled the remaining jurors.[4] The alternative juror indicated that she did not participate in the deliberations; she only made coffee, listened quietly and did not vote. (234a).

[4] One juror was going to be late so the parties agreed to poll the jurors present and then poll the last juror when she arrived that day. The court also recalled the alternate juror and questioned her.

While waiting for the last juror to appear, defense counsel again asked for a dismissal, citing jeopardy principles. The assistant prosecutor noted that no order declaring a mistrial was ever entered. Judge Cooper indicated that there was no mistrial. The verdict was announced by the foreperson, the verdict form was signed by the foreperson and given to the court clerk. There was no jeopardy because there was no mistrial. Secondly, "the acquiescence would in fact that was sort of a joint decision at the bench off the top of our heads which has been recalled prior to the entry of a formal judgment." (Sic) (239-240a). The last juror arrived and affirmed that her verdict in the four cases was guilty. (242a). Defendant was sentenced on October 29, 1998.

Defendant appealed to the Court of Appeals. In a published opinion, the Court determined that a) the trial court abused its discretion by declaring a mistrial, b) the trial court did not abuse its discretion by setting aside the mistrial, c) it was error to recall the jurors to complete the polling and there was no valid verdict to reinstate, d) the jeopardy clause did not prevent a retrial because the court of appeals was finding manifest necessity for a mistrial based on two obvious procedural errors. (33-44a).

This court held the applications for leave to appeal in abeyance, pending this Court's decision in *People v Lett,* 466 Mich 206 (2002). (45a). Following the decision in *Lett,* this Court then granted the applications for leave to appeal. (47a).

ARGUMENT

I. THE TRIAL COURT'S DECISION TO DISMISS THE JURY AFTER THE FOREPERSON HAD ANNOUNCED THE VERDICT, BUT BEFORE THE WHOLE PANEL WAS INDIVIDUALLY POLLED, WAS NOT ERROR BECAUSE IT WAS CONSENTED TO BY THE DEFENSE.

In *United States v Olano*,[5] the Supreme Court was faced with the situation of an alternate juror being present during jury deliberations, which was improper under FRCP[6] 24(c). The question was whether the having 13 jurors in the deliberation room had been forfeited at trial by the defendant's failure to object, and whether the error constituted plain error under FRCP 52(b).

The Court began its analysis by quoting the principle that "No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Olano,* at 729, (internal citation omitted). In the matter now before the Court, the People maintain that: A) There was either direct consent or implied consent of the court's initial decision to declare a mistrial, or B) Manifest necessity existed because of an obvious procedural error under Michigan law.

Standard of Review

The standard of review depends on how this Court looks at this case. If the Court chooses not to look at the "procedural default," defendant's waiver through an implied consent to the trial court's actions, then the standard of review for a mistrial is an abuse of discretion. *People v Manning*, 434 Mich 1, 7 (BOYLE, J.), 21 (BRICKLEY, J.) (1990).

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[5] *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).
[6] Federal Rules of Criminal Procedure.

Consent and Waiver

It is well settled that waiver is different from forfeiture. Forfeiture is the failure to timely assert a right, while waiver is the "intentional relinquishment or abandonment of a known right. *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). The defendant's actions in this case are at a minimum an implied consent to the trial court's actions and thus a waiver of any error in this case. Moreover, the record supports Judge Cooper's determination that defendant agreed by nodding his head to the court's decision to declare a mistrial. Trial counsel indicated that was his recollection stating; "I know I didn't affirm—respond affirmatively. When the Court said we have a mistrial, I think I did this, a slight nod, acquiescing in the Court's statement." Judge Cooper made sure that there was a nod, that there was no protest, and trial counsel indicated that he did not protest. (218a). Judge Cooper ruled:

> Well, then we don't have a problem then. Then we either have a mistrial or I reinstate the verdict. I've done research, and the fact that we have an extra juror will go—is not a mistrial. If you had eleven jurors, we would have a problem. If we have thirteen jurors it's not a problem and in point of fact, there are many states in the union who allow the alternate in there in deliberations. We do not, but many other states do. The problem would be if there were eleven jurors. It is not a problem if there were thirteen.
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> Now, the other difficulty is that the poll was not completed. If you wish, we can now compile the addresses and phone numbers of the jurors and we can bring them back in and make a record and I can reinstate the verdict. Or we can go forward with a second trial, because there was not a protest, there was a silent acquiescence with a nod to the mistrial. (218a).

Judge Cooper also noted that the jury had stated that the verdict was guilty, prior to her declaration of the mistrial. This distinguished the cases where a mistrial was declared prior to the verdict. "There's a verdict that was rendered here." In response to the defense argument that the verdict was not complete until the jury is polled, Judge Cooper stated that " the verdict was rendered when (a) we have a marked verdict sheet and (b) when the juror—the foreman indicates that that is the verdict of the jury. The polling is simply a verification." (220a). Trial counsel pressed for dismissal, but Judge Cooper responded that trial counsel had nodded during the discussion at the bench and that was acquiescence of the defendant. Trial counsel indicated that there was not a record made of what occurred at the bench, and that this was a distinction that mattered. (222a). Judge Cooper asserted that once the verdict is rendered, that's a valid verdict, and that the polling was for the record. "The prejudice to the defendant is not there and I will reinstate the case."

Defendant had two opportunities to object to the trial court's decision. First, at the bench while the jury was still in the courtroom, but no objection was made and trial counsel even nodded his acquiescence to the trial court's decision. When making the record on the day after trial, counsel properly acknowledged that at the bench, on the previous day, he nodded his acquiesce.

Whether this nodding is interpreted as agreeing with the decision or as agreeing with the court's power to declare a mistrial, the distinction does not matter in this analysis. If this Court determines that the consent was either expressed or implied, then a waiver analysis applies and no relief is available to defendant when he has waived this issue for purposes of appellate review.

In determining whether a defendant has consented to a mistrial, "the important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." *United States v Dinitz*, 424 US 600, 607-609; 96 S Ct 1075; 47 L Ed 2d 267 (1976). In this regard, the relevant issue is whether defendant consented to the discontinuance of the trial, rather than whether he formally consented to the declaration of a mistrial. *People v Hicks,* 447 Mich 819, 831 (1994). Defendant's consent can be expressed or implied. *People v Hoffman,* 81 Mich App 288, 297 (1978), citing *People v Gardner,* 62 Mich 307, 311 (1886).

The idea of implied consent is not a new concept to the law, nor is it new to Michigan law. *People v Johnson*, 396 Mich 434, 432 (1976) repudiated on other grounds in *People v New*, 427 Mich 482 (1986). In *Johnson,* defense counsel asked about a polygraph examination. This caused the prosecution to move for a mistrial; counsel for the co-defendant also moved for a mistrial. Trial counsel for Johnson explained that he did not know that it was improper to ask a witness about a polygraph. Co-defendant agreed with the mistrial, but *Johnson's attorney purportedly "never commented one way or another on whether he would consent to a mistrial."* In a 3-2 decision[7], this Court indicated that a defendant "must do something positively in order to indicate he or she is exercising primary control." *Johnson* at 432-433. The three-member majority found that in the "absence of an affirmative showing on the record, this Court will not presume to find such consent." *Johnson* at 433. No mention was made of this Court's decision in *Gardner, supra* where the whole court agreed that the discharge of the first jury "must have to have been made without the consent, express or implied, of the respondent." *Gardner* at 311.

[7] As a 3-2 decision, the precedential effect is not clear. *In re Curzenski Estate,* 384 Mich 334 (1971).

(*Gardner* involved the defense wanting it both ways, that is, objecting to the seated jury, and then objecting to a new jury.) *Hicks, supra,* appears to retreat from *Johnson*, (to the extent that one can resolve the fractured voting with no opinion's reasoning garnering more than two votes) there the lead opinion stated that "We decline to extract consent from defendant Hick's justifiable refusal to accept the alternatives proffered...We note that the hallmark of consent is the defendant's retention of primary control over the course of his trial." *Hicks* at 831. This Court in *Lett, supra,* at 222 n15 (2002), specifically declared that it was saving for another day the issue of implied consent. That issue is now squarely presented by the facts of this case.

Judge Cooper stated that there was not a protest, rather there was a silent acquiescence with a nod to the mistrial. (219a). The trial court was properly applying federal law and quite properly found an implied consent. Trial counsel knew the jury's verdict before he approached the bench. He was fully aware that the foreperson had announced in open court that the jury had found the defendant guilty on all four charges. Then, after the judge said that she would declare a mistrial, at no time did he ever object to the judge declaring the mistrial, even though he had plenty of time to object. In essence, petitioner was "attempting to exploit a newly perceived advantage with this jury." *United States v. Crosley,* 634 F.Supp. 28, 32 (E.D. Pa. 1985), *affd.,* 787 F 2d 584 (CA, 3 1986).

In *United States v. Gantley,* 172 F 3d 422, 429 (CA 6, 1999), the Sixth Circuit specifically pointed out that, under the right circumstances, the failure to object to a mistrial is an implied consent. In *Gantley,* in spite of the trial court's ruling to the contrary, the defendant testified that he had in fact taken a polygraph. Under the circumstances, the Sixth Circuit found the defendant's failure to object amounted to an implied consent. Not only did he not object when he had the chance, but he himself created the problem. In the present case, defendant created the

problem (or, at least, tried to exploit it) by not bothering to mention any claim of jeopardy until the next day when the parties appeared for a new trial. Then, even though he had plenty of time, he did not object to a *mistrial* being declared.

In *United States v. DiPietro,* 936 F 2d 6 (CA 1 1991), the First Circuit said that consent may be inferred where the defendant had the opportunity to object and did not. In *DiPietro,* several minutes elapsed between the time that the judge said that he would declare the mistrial and the time that he told the jury. During that time, the judge discussed matters with the parties. In finding an implied consent, the First Circuit pointed out that, had the defendant objected, the judge could have reconsidered his decision. *DiPietro* at 11. In the present case, the same occurred. The judge did not make her announcement before the jury until after she called the parties to the bench and informed them of what she planned to do. A number of minutes then elapsed until the judge told the jury. (213a). Not once in this intervening time did defendant ever say that he disagreed with a mistrial. Not once did he ever say that he wanted to have this jury decide the matter (of course, sound strategy may have been behind trial counsel's decision, as noted above, trial counsel already knew that the foreperson had declared in open court that defendant was guilty on all four counts) and have the court finish polling the jury. In other words, he did not object. In still other words, he gave his implied consent.

Many courts that have looked at this situation have found an implied consent. In *United States v. Toribio-Lugo,* 164 F.Supp. 2d 251 (D.P.R. 2001), the judge declared a mistrial a few days into the trial when he discovered that he had only eleven jurors and the defendant would not consent to proceeding without twelve. In finding implied consent, *Toribio-Lugo* pointed out that no one objected, despite having an opportunity. All remained in the courtroom for several

minutes after the judge's announcement, and before the judge mentioned the matter to the jury. *Toribio-Lugo* at 254-255.

In *Camden v. Circuit Court of Second Judicial Circuit,* 892 F.2d 610, 615 (CA 7, 1989), *cert. denied,* 495 U.S. 921 (1990), the Seventh Circuit found an implied consent even though the opportunity to object was "minimal." It stated that "the court's comments about a mistrial and reference to a second trial should have prompted defense counsel to object if he did not agree with the need for a mistrial or the propriety of a retrial." *Camden* at 615.

Nor is the theory of implied consent newly minted. In *Scott v United States,* 202 F 2d 354, 355-356 (CA 1, 1952), *cert. denied,* 344 U.S. 879 (1952), the District of Columbia Circuit Court found an implied consent where time existed between the judge's statement and the jury's disbursement. The Court concluded that the defendant should have objected during the time that he was waiting for the jury to come back. *Scott* at 355-356.

In *United States v. Smith,* 621 F 2d 350, 352 (CA 9, 1980), *cert. denied,* 449 U.S. 1087 (1981), the judge declared a mistrial when a juror had a stroke, and the defendant refused to proceed with only eleven. During the time between the judge making his statement and the jury being discharged, the parties discussed matters. The Ninth Circuit specifically found that an objection would not have been too late until after the jury was discharged. *Smith* at 352, n.2.

In *United States v. Puleo,* 817 F 2d 702, 705 (CA 11, 1987), *cert. denied,* 484 U.S. 978 (1987), the Eleventh Circuit put the matter boldly: "We conclude that when a defendant has had an opportunity to object to the declaration of a mistrial and fails to do so, his consent to the declaration of a mistrial may be implied." In the present case, defendant did not object to the mistrial, rather defense counsel wanted it both ways. That is, for the court not to finish polling the jury and gaining assent to the public verdict, and still hoping for a mistrial without directly

asking for one so that he could argue that there was no consent and jeopardy, which would prevent a second trial. Just as in *Crosley, supra,* disagreeing then comes too late.

In addition, in the present case, petitioner in fact had plenty of time to tell the judge that he did not want a mistrial. In *United States v. Beckerman,* 516 F 2d 905, 908- 909 (CA 2, 1975), the Second Circuit Court found implied consent even though the judge did not solicit opinion and cut off an attempt to offer suggestions. The Court specifically inferred an accord by the defendant's failure to object or to request a side bar. *Beckerman* at 908-909. *United States v. Ham,* 58 F 3d 78, 84 (CA 4, 1995) *cert. denied,* 516 U.S. 986 (1985), goes ever farther. There, the Fourth Circuit found an implied consent from the defendant's not interrupting the judge while he was dismissing the jury. In the present case, the jurors returned to the courtroom, announced its verdict, and polling started before the attorneys approached the bench. Judge Cooper even briefly questioned the alternate juror before the parties had an off the record discussion. A mistrial does not actually take effect until the judge actually tells the jury. *United States v. Baggett,* 251 F 3d 1087, 1095 (CA 6, 2001), *cert. denied,* 122 S.Ct 1184 (2002); *Camden, supra, Smith, supra.* Not once until after the judge discharged the jury did petitioner ever say that he disagreed with that decision. Thus, the Michigan Court of Appeals incorrectly found that there was no consent. The only case that the People have found that rejected an implied consent analysis even though the defendant had had an adequate chance to object is *United States v. Combs,* 222 F 3d 353 (CA 7, 2000). There, the Court was presented with a very unique situation. The judge had just pointed out that the trial lawyer had a conflict of interest (actively representing the prosecution's chief witness). The defendant then said that he would not waive the conflict of interest, but that he wanted to keep the lawyer. The Court found that the conflict of interest prevented the defense lawyer from implicitly consenting (even where he had time to

lodge an objection). It also found the defendant's statement that he did not wish to waive any of his rights prevented him from implicitly consenting. (On the other hand, the Court affirmed a finding of manifest necessity.)

In *Love v Morton*, 944 F Supp 379 (1996)[8], the district court held an evidentiary hearing where the trial judge testified that he did not give the parties an opportunity for input before he made his decision to declare a mistrial. (The judge's mother-in-law had died and the judge needed to get home to assist his wife in her time of grief). On the issue of implied consent, the court focused on four factors: 1) counsel's opportunity to object to a mistrial, 2) the extent to which the trial court solicits counsel's views of a mistrial, 3) counsel's awareness of the Double Jeopardy issue, 4) the likelihood that counsel would have consented. Under these unusual conditions (the trial judge testified that he was not the type to seek input on his decisions) the court found that defendant had not consented to the mistrial and that there was not manifest necessity on these facts, thus barring retrial. The Third Circuit affirmed, finding that there were alternatives to declaring a mistrial. This is a position that was rejected by the United States Supreme Court in *Arizona v Washington,* 434 US 498; 98 S Ct 824; 54 L Ed 2d 717 (1978).

In the present matter, there was ample opportunity to object, and the trial court called the parties to the bench before she declared a mistrial. Counsel's awareness of the Jeopardy issue is clear from the record the next day. There can be no doubt that counsel would have consented

[8] Love was affirmed by the Third Circuit, 112 F 3d 131 (CA 3, 1997). The district court noted that almost every circuit allowed an implied consent finding. The First, Fourth, Fifth, Seventh, and Eleventh Circuits have focused exclusively on the defendant's opportunity to object. The Sixth and Ninth Circuits have required some indication of the defendant's willingness to acquiesce to the mistrial. The Second Circuit while claiming to follow a "totality of the circumstances" test, applies the "bright-line" rule of the defendant's opportunity to object. The states that have considered this issue are more evenly split. Slightly more than half the States do that have considered the question do not find silence as consent. See *63 ALR 2d Sec 791.*

directly if he was required to respond to by the court. As noted above, the verdict was announced and all that was left was polling of the jury. Whether one considers the consent explicit through the nodding of the head in acquiescence, or implicit from the lack of an objection when given the opportunity at the bench and the nodding agreement, there was consent.

> Parties may give assent in many ways. If a judge should say: 'I think a mistrial would be a good idea, but think this over and let me know if you disagree,' the defendant's silence would be assent. The principal functions of the double jeopardy clause are to allow a defendant to get a verdict at the first trial if he wants one and to keep a verdict that is favorable. *United States ex rel. Young v Lane*, 768 F.2d 834, 837 (CA 7, 1985), cert denied, 474 U S 951; 106 S Ct 317; 88 L Ed 2d 300 (1985). Whether the defendant wants a verdict is something he knows best, and when the occasion for choice comes he must choose unless, as in *Jorn*, the judge brooks no opposition, or unless there is insufficient time to deliberate.
> *United States v Buljubasic*, 808 F 2d 1260, 1265-1266 (CA 7, 1987).

At a minimum, there was consent by adoptive admission or a tacit admission by the defense. The general rule for silence to operate as an admission requires the party capable of denying the truth of the assertion must have heard the assertion (trial counsel was told directly by Judge Cooper that she was going to declare a mistrial while at the bench) and the circumstances must have been such that a reasonable man would have denied the assertion. *Donker v Powers*, 230 Mich 237 (1925). It would not be difficult to require the defense to object to the declaration of the mistrial if defendant thought that he would have been in a better position by completing the polling of the jury. Defendant was in a position to control the termination of the trial. His silence cannot act as a sword to relieve him from the consequences of his voluntary choice.

Whatever approach this Court adopts, it is a certainty that under the facts of this case, consent must be found. Any other decision would frustrate the "ends of public justice" and are not outweighed by the defendant's interest in having one factfinder reach a decision.

B) Manifest Necessity Existed Because of an Obvious Procedural Error

If this Court is not satisfied that defendant consented to the mistrial, then the Court must next determine if there was manifest necessity for the trial court declaring a mistrial. The Michigan Constitution 1963, Art. 6 Sec 5 establishes that the "Supreme Court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of the state." Consistent with this constitutional provision this Court has enacted MCR 6.420(C).

> **(C) Poll of Jury**. Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exist, declare a mistrial and discharge the jury.

Both the United States Supreme Court and this Court have consistently maintained that a retrial is not barred when the mistrial is based on manifest necessity, even in the face of an objection by the defendant. "The classic formulation of the test to be applied in determining whether retrial is permissible was articulated by Justice Story in *United States v Perez*, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824):

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes…"
>
> Quoted in *People v Hicks*, 447 Mich 819, 828 (1994).

The Supreme Court expanded on *Perez* in *Illinois v Somerville*, 410 US 458; 93 S Ct 1066; 35 L Ed 2d 425 (1973), where after the jury had been sworn, the panel was dismissed because of a defect in the information that could not be cured by amendment. The trial court declared a mistrial over the defendant's objection. The defect in the information would have lead to the overturning of a guilty verdict on appeal. The Supreme Court noted that the action of a mistrial was used to implement a legitimate state policy, that there was no manipulation to respondent's prejudice and that the mistrial was required by manifest necessity and to "further the ends of public justice." The Court specifically rejected any rigid formula as inconsistent with the guiding principles of *Perez*. Expanding on *Perez's* manifest necessity being found where a jury is unable to reach a verdict, the majority noted other cases such as excluding a juror in midtrial who was "probably prejudiced" against the Government,[9] as being consistent with the ends of public justice. *Somerville*, listed other examples where mistrials were determined to be proper, and then concluded that the Court is able to "Distill a general approach" that a mistrial is proper if a) an impartial verdict cannot be reached or b) the verdict was reached but reversal on appeal due to an obvious procedural error in the trial.

Michigan has found manifest necessity for a mistrial where (1) compelling circumstances would deprive the defendant of a fair trial or make completion of the trial impossible, (2) where an impartial verdict can not be reached, or (3) a conviction would be reversed on appeal due to an obvious procedural error. *People v Echavarria,* 233 Mich App 356 (1999), *lv den* 461 Mich 899 (1999).

[9] *Simmons v United States*, 142 US 148 (1891).

Applying these standards to the instant matter, and giving the trial judge's decision the deference that it is entitled to receive, there was no abuse of discretion in the initial determination of declaring a mistrial. "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial." *Somerville*, at 464. In this case, there are arguably two procedural errors that would have required reversal, according to the Court of Appeals; "the repolling of the discharged jury, and the reinstatement of an invalid verdict." (41a). There is also the fact that 13 jurors were in the deliberation room. The first two matters occurred after or as a result of the trial court declaring a mistrial, and are thus nonfactors because they did not exist until the trial court declared a mistrial. The last factor is the 13 juror question. At least one panel of the Court of Appeals has held that "If 13 jurors did in fact render a verdict, defendant is entitled to a reversal. *People v Sizemore,* 69 Mich App 672, 679 (1976)[10]. It appears that the trial court was aware of this when she made her initial determination and declared a mistrial. The People acknowledge that *Olano, supra*, determined that the presence of 13 jurors is subject to analysis as plain error under the Federal Rules of Criminal Procedure. At the very least, *Sizemore* was controlling on the trial court. A reasonable reading and application of existing state law reveals that the conviction would have been reversed due to an obvious procedural error.

[10] *Sizemore*, remanded for a factual determination of whether the 13 jurors rendered a verdict, in which case defendant would be entitled to a reversal. This decision appears to conflict with the court of appeals decision in *People v Rushin*, 37 Mich App 391 (1971). In *Rushin* the panel held that "Once the jury has been officially discharged and left the courtroom,...it is error to recall it in order to alter, amend or impeach a verdict in a criminal case." *Rushin*, at 398.

II. THE TRIAL COURT'S DECISION TO RECALL THE JURY AND REINSTATE THE JURY'S VERDICT IF ERROR, WAS HARMLESS WHERE THE INITIAL DECISION OF THE TRIAL COURT WAS NOT A MISTRIAL BUT A GRANT OF A NEW TRIAL.

Standard of Review and Issue Preservation

The trial court released the jury before finishing an individual polling as required by MCR 6.420(C), when requested by trial counsel. The defense did not object on the grounds raised by the Court of Appeals but did make a "record" as to the defense position. Assuming, *arguendo,* that the defense objection was sufficient to preserve this issue for review, the proper standard of review is for preserved nonconstitutional error. Defendant has the burden of establishing a miscarriage of justice under a "more probable than not" standard. *People v Lukity*, 460 Mich 484 (1999). Does the error asserted undermine the reliability of the verdict? *People v Toma*, 462 Mich 281 (2000).

Analysis

At the conclusion of the trial, Judge Cooper had one of the thirteen jurors on the panel excused. Unfortunately, the juror went into the jury deliberation room with the twelve other jurors. (211a) Twenty minutes later, the jury had reached its verdict. The foreperson read the verdict; defendant was guilty as charged on all four counts. (212a). After accepting the verdict, Judge Cooper asked if either party wanted the jury polled. At the request of the defense, Judge Cooper began to poll the jury when she noticed that there were thirteen jurors in the jury box. The alternate indicated that she was in the jury room because no one told her to do anything else. (213a). A bench conference took place, followed by Judge Cooper releasing the jurors.

The next day, after conducting some research, Judge Cooper indicated that the verdict had been read but that the polling had not been completed. She stated that the verdicts would be reinstated and the jury brought back to court and polled. (222a) Judge Cooper found that there

was no prejudice to the Defendant because 13 jurors had found him guilty instead of 12 jurors[11]. (226-227a) The presence of an alternate juror during jury deliberations in a criminal case is reviewed for plain error that affects substantial rights of the defendant. The reviewing court should reverse only when the defendant is actually innocent, or the error affected the fairness, integrity of judicial proceedings. *People v Carines*, 460 Mich 750 (1999).

The jury was subsequently brought back to court for polling; this included the alternate juror. The alternate juror explained that she did not vote or participate at all in the deliberations. (T of 10-9-98, 8) In *Olanoo, supra,* the Supreme Court held that the presence of alternate jurors during jury deliberations was not plain error affecting the substantial rights of the defendants in the absence of proof by the defendant of its prejudicial impact. Like the defendants in *Olano, supra*, defendant bears the burden of proving prejudice to the defense. Cf.: *People v Bettistea*, 173 Mich App 106, 133-134 (1988). No prejudice has been alleged or proven. Judge Cooper did not err by taking the verdict and accepting it as the jury's decision.

In *People v Tate*, 244 Mich App 553 (2001), the Court of Appeals noted that there was a violation of the Michigan Court Rules, but reasoned that reversal of a conviction is only required when the defendant has been prejudiced by the procedure. Holding that the defendant had not shown prejudice and that the evidence of guilt in the case was overwhelming, the panel refused to reverse the defendant's conviction. In the present matter, the panel has applied a presumption of prejudice and reversed defendant's conviction. There is no evidence of a juror recanting,

[11] The U.S. Constitution does not require a unanimous verdict of twelve persons. *Williams v Florida,* 399 US 78, 90; S Ct 1893; 26 L Ed 2d 446 (1970), *Apodaca v Oregon*, 406 US 404; 92 S Ct 1628; 32 L Ed 184 (1972). Michigan law is contrary, *People v Luby*, 56 Mich 551 (1885).

altering, amending or impeaching his or her verdict. There was no evidence that any of the jurors changed their minds, based on outside influences imposed on them after the verdict. The Court of Appeals decision implies that the foreperson falsely responded to her questioning, when reporting the jury's verdict. Further, the individual jurors lied when polled by the trial court. C.f., *United States v Hillard*, 701 F2d 1052 (CA 2, 1983), *cert den* 461 US 958 (1983), where the court found a "clear violation of FRCP 24(c), when the judge added a dismissed alternate to the deliberating panel when one of the twelve jurors on the panel was unable to continue deliberations. The error did not require reversal because there was no demonstration of prejudice.

As the Wisconsin Court of Appeals noted in a similar case, where the jury was dismissed and then recalled and polled 51 days later, "the risk is not whether the jurors were subject to outside influences after they dispersed. The risk is whether outside influences affected their answers when they were individually polled concerning the state of mind when the verdict was returned. A juror's change of mind after the verdict was returned is irrelevant." *State v Coulthard,* 171 Wis 2d 573; 492 NW 2d 329 (1992)

If this Court is not satisfied that the defendant consented to the mistrial and that the trial court lacked manifest necessity in declaring a mistrial, the People maintain that the trial court's decision in this matter was actually a new trial and not a mistrial. This Court has noted that it is not the label that the judge attaches to his or her ruling, but what is the effect of that ruling on this issue before the court. In the area of directed verdicts, this Court has twice announced that "The trial court's characterization of its ruling is not dispositive, and what constitutes an 'acquittal' is not controlled by the form of the action."...Thus a reviewing court must look to the substance of the decision to determine...the ruling of the judge." *People v Mehall,* 454 Mich 1, 5 (1997), and *People v Nix,* 453 Mich 619, 627 (1996). The record in this matter discloses that the

foreperson announced the verdict and that the court accepted the verdict. The court rule provides that after the verdict is announced, then the jury may be polled at the discretion of the court or must be polled at the request of a party. This leads to two questions. First, when is the verdict a verdict, and second, can there be a mistrial after the jury has announced its verdict. The court of appeals held that a verdict is not final until it is announced in open court, assented to by the jury, and accepted by the trial court. (40a). The court of appeals relied on *People v Sanders*, 58 Mich App 512, 516-517 (1975). However, *Sanders* was discussing when a charge is pending and not completed for purposes of the then consecutive sentencing statute. The court rules mandate that a verdict must be returned in open court MCR 6.420(a). The People would agree that a verdict must be accepted by the **court**. *People v Little,*[12]305 Mich 482 (1943) However, neither the court rules, case law or the statute require that there be assent by the individual jurors in every case; nor may it be asserted that a defendant has a constitutional right to have a jury polled, *Carreriza v Moore,* 217 F.3d 1329, 1336-1337 (CA 11, 2000), *cert den* 513 US 1170 (2001). Even if this Court were to hold that a defendant has a constitutional right to have the jury polled, the United States Supreme Court has rejected the view that all constitutional errors in the course of a criminal trial require reversal. *Sullivan v Louisiana*, 508 US 275, 278; 113 S Ct 2078; 124 L Ed 2d 182 (1993). If it was error in recalling and polling the jury, the

[12] *People v Little,* the jury verdict was accepted by the court clerk with the defendant present, but not the judge. This Court determined that the verdict was void and that a void verdict did not entitle the defendant to a discharge but did require a new trial. Also see *People v Allen*, 252 Mich 553 (1930), where the Court stated that a void verdict in a criminal case entitles the defendant to a retrial and not a discharge. MCL 763.2, which states in pertinent part: No person...shall be convicted...unless...after trial by the court or by the verdict of a jury accepted and recorded by the court."

verdict is surely unattributable to the error. The People acknowledge that the court rule does provide that on motion of either party the jury must be polled, but does the ability to motion for a polling of the jury establish that it is mandatory in every case. If the rule is that the jury must assent to the verdict for there to be a valid verdict, as announced by the court of appeals, this is contrary to the plain language of the court rule. MCR 6.420(C) does not require this, in fact, polling is only required following a motion.

If one accepts the position of the trial court that there was a verdict and that the verdict was accepted by the court, then the "label" that the trial court imposed on its decision is of no moment. Once the verdict was announced in open court and accepted by the court, the trial was complete. If the trial was complete there could not be a mistrial, only at best a conditional granting of a new trial, when one looks to the "substance of the decision," *Mehall*.

If on the other hand, there was no verdict because there was no polling, then it would logically follow that polling is required in every case to have a valid verdict. MCR 6.420(C) does not require polling, except on the motion of a party or on the court's own initiative. The third possibility is that sometimes there is a valid verdict when it is announced and accepted, and sometimes there is no verdict when it is announced and accepted until the jury is polled.

If, as in this matter, there is no polling despite a request by a party, and if polling is not constitutionally mandated, what remedy is proscribed for a violation of the court rules. That is, had the trial court not recalled the jury and instead just relied on the jury's oral announcement, what relief would this or any defendant be entitled to receive on appellate review? The court rule is silent as to any remedy. Is the defendant entitled to a dismissal because the jury was not polled? This seems to exalt form over substance. Certainly at this point plain error must be applied at a minimum. Defendant did seek to have the jury polled after they announced that he

was guilty on all four counts. The trial court polled one juror, then noticed that 13 jurors were in the jury box. When the court stopped the polling, there was no objection from the defense. Under *People v Carines* 460 Mich 750 (1999), defendant must demonstrate plain error that affected his substantial rights. A reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Olano, supra.* There was error in not finishing the polling of the jury, arguably the error was plain as the court rules require such a poll on the motion of a party. However, there is no doubt that the substantial rights of the defendant were not violated by the court's not finishing the polling of the jury. Defendant made four hand-to-hand deliveries to an undercover officer. Defendant wrote out a statement acknowledging his involvement in the drug deliveries. Defendant took the stand and admitted under oath that he delivered drugs on three different occasions to the officer and on one occasion he delivered an imitation controlled substance to the undercover officer. The foreperson announced a verdict of guilty. The court received the signed verdict form. No substantial right of the defendant was violated.

Therefore, the trial court's actions in this matter are more clearly seen as a conditional grant of a new trial rather than as a mistrial. A post verdict mistrial ruling is functionally indistinguishable from an order granting a new trial. *State v Garza*, 774 S.W. 2d 724 (1989). The People are aware that *Rushin, supra*, held that once a jury is discharged from the courtroom the jury could not be recalled in order to alter, amend or impeach its verdict in a criminal case. Thus jurors are "proscribed from deliberating further in the case." *Rushin* at 399. At no point did either party seek to have further deliberations, alter, amend or impeach the jury's verdict. C.f.; *People v Gabor*, 237 Mich App 501 (1999) lv den 462 Mich 910 (2000). The risk is not that the jurors were subject to outside influences after their dismissal, but whether outside influences affected

the jurors when they were polled. The Court should not be concerned with a juror's state of mind after the verdict, the concern is did outside influences changed the jurors mind between the time of the voting and the time of the verdict and subsequent polling. *Coulthard, supra.* In this matter there is no evidence that an outside influence change the juror's minds between the time of the voting and the time of the polling.

III. THE CONSTITUTIONAL PROTECTION AGAINST BEING TWICE PLACED IN JEOPARDY IS NOT IMPLICATED IN THIS MATTER WHERE DEFENDANT CONSENTED TO THE ACTIONS OF THE TRIAL COURT, AND/OR THE TRIAL COURT DETERMINED THAT THERE WAS MANIFEST NECESSITY FOR ITS ACTIONS.

This Court, in it's grant of leave, directed the parties to brief whether the constitutional protection against double jeopardy is implicated in this matter and if it is, whether harmless error is applicable. The People's short answer to the question is that double jeopardy is not implicated in this matter based on the defendant's consent to the trial court's actions. However, the harmless error analysis in issue two is applicable to the actions of the trial court recalling and polling the jury. In anticipation of the Defendant-Appellee/Cross Appellant argument, the People offer the following analysis on the double jeopardy issue.

Standard of Review

A double jeopardy challenge is a constitutional question of law that is reviewed de novo. *People v Herron*, 464 Mich 593, 500 (2001).

Analysis

The "scope of the law of jeopardy is apparently the same under both the Michigan and United States Constitutions." *Johnson, supra* at 430 n2. The Michigan Constitution 1963, Art. 6, sec 15 provides the same protections as the US Constitution, Amendment V. The protection of the federal constitution is enforceable against the states through the Fourteenth Amendment, *Maryland v Benton*, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969). The constitutional prohibition against double jeopardy is usually reported as consisting of three separate guarantees protecting the accused against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishment for

the same offense. *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). None of these situations occurred in this matter.

Jeopardy attaches when the jury is sworn, this rule applies to the states under the Fourteenth Amendment. *Crist v Bretz*, 437 US 28; 98 S Ct 2156; 57 L Ed 2d 24 (1978). However, "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v Somerville, supra,* at 467. In *Somerville*, the Court noted that one should not ignore the facts of a case, while looking only to the language employed by the court which serves "only to distort its holdings." No decision has held that the defendant's right to one trial before one trier of fact may never yield to "the public's interest in fair trials designed to end in just judgments." Clearly the jeopardy clause is not an absolute bar to successive trials. *Boston Municipal Court v Lydon*, 466 US 294, 308; 104 S Ct 1805; 80 L Ed 2d 311 (1984). The protections in the clause is a personal defense that may be waived[13] or foreclosed by a defendant's voluntary actions or choices including consenting to a mistrial *DiPietro, supra* at 9 n5. Therefore, in the present matter the question presented for jeopardy purposes is whether the mistrial was declared with the defendant's consent. *Dinitz, supra,* at 608. If the mistrial is declared with the defendant's consent, he is deemed to have waived any jeopardy claim. Where the defendant has objected and a mistrial is declared over the objection, jeopardy will not prevent a second trial where there was manifest necessity requiring the trial court to act. The one exception is when the mistrial is declared where the prosecutor

[13] Footnote 11 in *Dinitz* was an explanation by the Supreme Court of why defendant's characterization of the consent question as a waiver of constitutional rights not to be placed twice in jeopardy was inappropriate. Simply put, defendant did not have to affirmatively waive on the record his right not to be twice placed in jeopardy before a mistrial could be declared.

intentionally provokes the defendant to request a mistrial. *Oregon v Kennedy*, 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982)[14].

The interest protected by the jeopardy clause is a defendant avoiding the anxiety, expense and delay occasioned by multiple prosecutions. There are times when a defendant seeks a mistrial as being in his best interest. In the occasions where he or she consents or there is manifest necessity for the mistrial, or if the ends of public justice would be defeated, the attachment of jeopardy does not prevent a retrial. In fact, a defendant may consider an immediate new trial a preferable alternative to the prospect of a probable conviction followed by an appeal and possible retrial at a much later date. A court reviewing the trial court's decision must examine the surrounding circumstances to discover whether the defendant had primary control over the decision on whether to proceed. *United States v Dinitz*, at 608[15]. In the present matter, defendant knew the jury's verdict and had only one choice, the opportunity for a second trial where a different jury might believe his defense. The alternative was an objection with a request that the trial court conclude its polling of the jury and sentence the defendant, followed by an appeal challenging the presence of 13 jurors. The chances of success on appeal of his conviction being reversed were remote. Defendant received an unintended benefit, and the protection of the interest served by the jeopardy clause.

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[14] In *Kennedy*, the Supreme Court reversed the Oregon Appellate Court that found that the prosecutor's question had provoked the mistrial, but that the trial court had found that the actions of the prosecutor where not intentional. The rule announced in *Kennedy* at 679 is that: "circumstances under which a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." In announcing this rule the Majority noted that the justification for a rule must be based on principle and not on authority. *Id. at 679.*

In *Gori v United States*, 367 US 364; 81 S Ct 1523; 6 L Ed 901 (1961), the trial court declared a mistrial with neither the approval nor objection of defense counsel, based on the prosecutor's line of questioning. The circuit court determined that the trial judge was acting according to his convictions in protecting the rights of the accused even if the decision was characterized as "overassiduous" and "premature." The Supreme Court stated "we are unwilling where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar all retrial. The Court was unwilling to require the trial courts to "navigate a narrow compass between Scylla and Charybdis." *Gori* at 369.

In a most interesting case of *United States v Scott*, 437 US 82; 98 S Ct 2187; 57 L Ed 2d 65 (1978), the Supreme Court reviewed the history of the jeopardy clause and noted that the "historical purposes are necessarily general in nature, and their application has come to abound in often subtle distinctions which cannot by any means all be traced to the original three common-law pleas." In the absence of a failure of proofs, "Double Jeopardy which guards against government oppression does not relieve a defendant from the consequences of his voluntary choice."

There was no failure of proofs in McGee's trial, the government did not intentionally seek to provoke the defendant into moving for a mistrial, and defendant should not be relieved of his voluntary choice. Defendant could have argued to continue the polling and preserve the alleged error of having 13 jurors for appeal. Alternatively, defendant chose to do nothing thus ending his right to be tried by the first factfinder, when he (through counsel) nodded his head and

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[15] *Johnson, supra,* in its 3-2 decision relied *Dinitz, supra,* and stated that a defendant must do something positive in order to indicate he or she is exercising primary control. This language is not found in *Dinitz.*

decided to abort the trial, his interest in having the matter heard by one factfinder has been protected because he (defendant) has made the choice to curtail the proceedings. His primary interest in being able to conclude confrontation with the state in one proceeding was protected, especially when balanced against the public's interest in one full and fair opportunity for presenting the People's proofs. *People v Hicks*, 447 Mich 819, 865 (1994) Dissenting opinion of Justice Boyle.

RELIEF

WHEREFORE, David G. Gorcyca, Prosecuting Attorney in and for the County of Oakland, by Thomas R. Grden, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to reverse the decision of the Michigan Court of Appeals, granting the defendant a new trial and reinstate the jury's verdict of guilty.

Respectfully Submitted,

DAVID G. GORCYCA
PROSECUTING ATTORNEY
OAKLAND COUNTY

JOYCE F. TODD
CHIEF, APPELLATE DIVISION

By: _____
THOMAS R. GRDEN(P39288)
Assistant Prosecuting Attorney

DATED: February 18, 2002